STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 28, 2009
v	No. 284243 Wayne Circuit Court
LEE MARCELL CAMPBELL, Defendant-Appellant.	LC No. 07-015213-FH

Before: Jansen, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant, via appointed counsel and acting *in propria persona*, appeals by right his jury conviction of delivery of less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv). We affirm defendant's conviction and sentence, vacate that portion of the judgment of sentence requiring defendant to reimburse the county for the cost of appointed counsel, and remand for further proceedings consistent with this opinion. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

The police received information concerning possible gang and narcotics activity at a home in Detroit. Officer Craig began conducting surveillance on the home. He observed defendant conduct two suspected narcotics transactions from the home. Craig contacted Officers Robson and Stewart and told them to move in to arrest defendant. Robson and Stewart testified that when they approached, defendant saw them and ran into the house. Robson testified that he observed defendant drop a few baggies of cocaine on the porch as defendant entered the house. Robson immediately followed defendant into the house. Robson testified that defendant ran through the living room and into a bedroom and that as he did so, defendant reached into his pants pocket and discarded a large baggie containing a number of smaller bags of cocaine. The police retrieved a chunk of cocaine on a square wood board on the floor of the bedroom, along with 32 smaller packets containing rocks of cocaine, both on the board, and on the floor of the bedroom. The officers also recovered four small packets of cocaine on the front porch.

Kala Campbell, defendant's brother and a defense witness, testified that while defendant had left the home earlier to go to the store, he had returned and was present for two or three minutes before the police knocked on the door demanding admission. Kala Campbell maintained that the rock of cocaine found in the bedroom belonged to him, and was located under his bed. He denied that he possessed any individual packets of cocaine.

Defendant first argues that trial counsel provided ineffective assistance by failing to move to suppress the cocaine found inside and outside the home where defendant was allegedly selling the cocaine. We disagree.

"Effective assistance of counsel is presumed, and [a] defendant bears a heavy burden of proving otherwise." *People v McGhee*, 268 Mich App 600, 625; 709 NW2d 595 (2005). "In order to overcome this presumption, defendant must first show that counsel's performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms." *Id*. "Second, defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel's unprofessional errors the trial outcome would have been different." *Id*. Because defendant failed to move for a new trial or for a *Ginther*[1] hearing, our review is "limited to mistakes apparent on the record." *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005).

Defendant maintains that since he was an overnight guest in the home, as evidenced by the fact that a key to the home was found on his person when he was arrested, he could avail himself of the Fourth Amendment protections accorded a homeowner. However, defendant bases his argument on an assertion that the testifying officers were lying about the circumstances of defendant's arrest. Defendant does not specify the manner in which his rights allegedly were violated or how the search was illegal, and cites no law to support his assertions. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment, with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). We find that defendant has abandoned the argument that the search and seizure was unconstitutional. See *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004).

Moreover, even were we to consider this argument, we would hold that defendant has not demonstrated reversible error.

During closing argument, defense counsel argued that the jury should accept defendant's brother's testimony that the cocaine belonged to him, and find that defendant did not possess the cocaine. Given this strategy, counsel's failure to challenge the seizure of the cocaine in the home was arguably objectively reasonable. That the strategy did not succeed does not automatically mean that counsel provided ineffective assistance. *People v Matuszak*, 263 Mich App 42, 61; 687 NW2d 342 (2004).

Nor can defendant show that but for counsel's error, the result of the proceedings likely would have been different. First, any illegality in the search of the home would not affect the seizure of the cocaine defendant abandoned on the porch. In addition, the totality of the circumstances presented a situation where the officers could reasonably conclude that they were in "hot pursuit" of a fleeing felon, and that immediate entry was necessary to prevent the escape of a suspect or the destruction of evidence. See *People v Cartwright*, 454 Mich 550, 558-559;

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

563 NW2d 208 (1997). Had this issue been raised below, the trial court likely would have reasonably concluded that the officers were justified in deciding that there was a need for immediate action and that therefore, the warrantless entry was not unlawful. Likewise, the "plain view doctrine" allows an officer to seize items without a warrant when those items are in plain view and the officer is lawfully present in the location where the item is seized. *People v Fletcher*, 260 Mich App 531, 546; 679 NW2d 127 (2004). The incriminating character of the item must be immediately apparent. *Id*. Here, Robson testified that he saw defendant discard the cocaine during the pursuit. Robson testified that he quickly recognized the discarded substance as contraband due to his prior experience. Any additional cocaine in the bedroom also would fall within this doctrine as the police attempted to collect what defendant had discarded. Therefore, even had counsel raised this issue, the trial court likely would have determined that the cocaine that was observed in plain view was not unlawfully seized. Under the circumstances, defendant cannot show a violation of his Fourth Amendment rights. Defendant has not shown that he is entitled to relief due to counsel's failure to challenge the cocaine seized from the home.

Defendant also argues that trial counsel provided ineffective assistance when she failed to properly cross-examine the police officer witnesses about inconsistencies between their trial testimonies and statements made in their earlier police reports. We disagree.

Decisions regarding what evidence to present and whether to call or question witnesses, as well as how to cross-examine and impeach a witness, are presumed to be matters of trial strategy, which we will not review with the benefit of hindsight. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004); *People v McFadden*, 159 Mich App 796, 800; 407 NW2d 78 (1987). The failure to present additional evidence constitutes ineffective assistance of counsel only if it deprives the defendant of a substantial defense that would have affected the outcome of the proceedings. *Dixon, supra* at 398.

Defendant points out discrepancies in the officers' trial testimony, and in the arrest reports written by Stewart and Robson. Defense counsel explored some of these discrepancies at trial; however, defendant overstates the effect of these minor inconsistencies, and of the others that counsel did not point out to the jury. Whether Robson told Craig or Stewart to retrieve the cocaine, or how many previous transactions Craig witnessed before he called for assistance, are facts that were relatively immaterial to the essence of the officers' testimony. Robson consistently maintained that he saw defendant discard the cocaine during the pursuit, and Stewart's testimony regarding the location and amount of the cocaine was likewise consistent. Counsel's apparent decision to rely on the defense witness's testimony rather than to quibble over inconsequential variables in the officers' accounts can be viewed as strategy. But even were we to find that counsel acted unreasonably, defendant's claim that the outcome would have changed here is highly speculative. We thus find that defendant has not shown that he is entitled to relief due to counsel's cross-examination strategies.

Defendant further argues that trial counsel provided ineffective assistance when she failed to object to the prosecutor's improper statements during closing arguments. We disagree.

Generally, claims of prosecutor misconduct are reviewed de novo to determine if the defendant was denied a fair and impartial trial. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). Because no objection was made to the prosecutor's challenged conduct here, we review the claims for plain error that affected defendant's substantial rights. *Id*., *People*

v Thomas, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). We review alleged instances of prosecutorial misconduct on a case-by-case basis, examine the record, and evaluate the prosecutor's remarks in context. *Thomas, supra* at 454; *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). "Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial." *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), overruled in part on other grounds in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

Defendant first argues that the prosecutor improperly expressed her personal belief in defendant's guilt, and vouched for the credibility of police witnesses. We disagree.

"A prosecutor may not make a statement of fact to the jury that is unsupported by evidence, but she is free to argue the evidence and any reasonable inferences that may arise from the evidence." *Ackerman, supra* at 450. In addition, while a prosecutor "cannot vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness," *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995), "a prosecutor may argue from the facts that a witness is credible or that a witness is not worthy of belief," *People v Unger*, 278 Mich App 210, 240; 749 NW2d 272 (2008). "The credibility of a witness is always an appropriate subject for the jury's consideration." *People v Coleman*, 210 Mich App 1, 8; 532 NW2d 885 (1995). The prosecutor's statements that the police, who had " the combined experience of well over thirty years" were telling the truth, had no reason to make up the charges against defendant, and would not "risk their pensions for this little tiny bit of dope" did not suggest that the prosecutor had special knowledge concerning the officers' truthfulness. It was instead an assertion that the police had no motive to lie about the offenses. This was a proper response to defendant's challenge to the officers' veracity in light of Kala Campbell's testimony.

Defendant also argues that the prosecutor made improper comments concerning Kala Campbell. During rebuttal, the prosecutor stated:

> Why would Mr. Campbell, the brother, come in and lie to you? Well, because it's his brother. And oh, he faces criminal prosecution. Well, I guess we can all imagine what will happen then. We charge the other Mr. Campbell, this Mr. Campbell's going to come in and say, those were my drugs. Don't let him do that. Don't let him do that.

Contrary to defendant's argument, this statement did not improperly denigrate the defense witness. Instead, it was a response to defense counsel's closing argument that Campbell had no motive to state that the cocaine was his and risk his own prosecution.

Defendant's contention that the prosecutor improperly told the jury it would have to find defendant guilty "no matter what they may think" misconstrues the prosecutor's actual statement, which noted that Kala Campbell only claimed ownership of the larger rock of cocaine. The prosecutor's statement was proper given Kala Campbell's testimony.

Because a prosecutor is not required to use the blandest possible language in arguing the facts and inferences, *Unger*, *supra* at 239, we find no prosecutorial misconduct requiring reversal here. Therefore, because counsel need not make futile objections, *People v Milstead*, 250 Mich

App 391, 401; 648 NW2d 648 (2002), defendant cannot show counsel acted unreasonably. In addition, defendant cannot show that the outcome of the trial likely would have been different had counsel objected.

Defendant next argues that the trial court erred when it imposed attorney fees without considering defendant's ability to pay. Defendant maintains that pursuant to *People v Dunbar*, 264 Mich App 240; 690 NW2d 476 (2004), the trial court was required to at least indicate that it had considered defendant's financial circumstances before assessing attorney fees. Defendant failed to raise this issue below; thus, our review is for plain error affecting defendant's substantial rights. *Id*. at 251.

When requiring a defendant to repay the cost of his court-appointed attorney, a sentencing court must provide some indication that it considered the defendant's ability to pay, "such as noting that it reviewed the financial and employment sections of the defendant's presentence investigation report," or even by simply stating that it considered the defendant's financial status. *Id*. at 254-255. Furthermore, "[t]he amount ordered to be reimbursed for court-appointed attorney fees should bear a relation to the defendant's *foreseeable* ability to pay." *Id*. at 255 (emphasis in original). The purpose of requiring the court to consider the defendant's ability to pay is to ensure that "repayment is not required as long as [the defendant] remains indigent." *Id*. at 256, quoting *Alexander v Johnson*, 742 F 2d 117, 124 (CA 4, 1984).

Recently, this Court affirmed the *Dunbar* holding in light of the language of MCL 769.1k, which became effective on January 1, 2006, and which provides in pertinent part that a trial court may impose "the expenses of providing legal assistance to the defendant" at the time of sentencing. This Court found that "[t]his statute does not eliminate the requirement, set forth in *Dunbar* that the trial court consider a defendant's ability to pay before to ordering reimbursement of appointed counsel costs." *People v Trapp*, 280 Mich App 598, 601; 760 NW 2d 791 (2008), citing *People v Arnone*, 478 Mich 908; 732 NW2d 537 (2007).

The trial court ordered defendant to repay court appointed attorney fees without discussing defendant's ability to pay, and thus clearly erred. *Id*. See also *Arnone*, *supra*; *People v DeJesus*, 477 Mich 996; 725 NW2d 669 (2007).

Defendant also argues that trial counsel was ineffective for failing to object to the imposition of court costs without considering defendant's ability to pay.

Unlike the imposition of attorney fees, defendant cannot show plain error in the trial court's assessment of court costs. The trial court has express authority to assess any costs at sentencing pursuant to MCL 769.1k(1)(b)(ii). See also MCL 769.34(6). Nor can defendant rest his argument on the *Dunbar* holding that the trial court must determine the defendant's ability to pay before assessing attorney fees. See *Dunbar*, *supra* at 252-254. In fact, *Dunbar*, at least implicitly, found the opposite. *Id*. at 255. In addition, the *Dunbar* panel reversed only the attorney fee reimbursement order, not the remaining assessed court costs in that case. *Id*. at 256. Nor did *Trapp* address this issue. Defendant presents no other authority to support his position, other than a reference to *Alexander*, which also involved a challenge to an order for reimbursement of attorney fees. Because defendant cannot show either plain error on the part of the trial court, or that counsel acted objectively unreasonably in failing to pursue what appears to

be a novel argument, see *People v Reed*, 453 Mich 685, 695; 556 NW2d 858 (1996), defendant has not shown that he is entitled to relief as to the imposition of court costs.

We affirm defendant's conviction and sentence, vacate that portion of the judgment of sentence requiring defendant to repay court appointed attorney fees, and remand with instructions that the trial court consider the attorney fees in light of defendant's ability to pay. An evidentiary hearing is not required on remand. The trial court can rely on updated financial information provided by the probation department. *Trapp*, *supra* at 601; *Dunbar*, *supra* at 255 n 14.

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Joel P. Hoekstra
/s/ Jane E. Markey